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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1603

STEPHEN BORGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1674

JOHN J. FRANK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pets. App. A) is reported at 494 F. 2d 145.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1974. A petition for rehearing was denied on April 11, 1974. A petition for a writ of

certiorari was filed by petitioner Borgman on April 25, and by petitioner Frank on May 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions for use of false names in the course of mail fraud, in violation of 18 U.S.C. 1342, and for conspiracy to do so.

2. Whether the district court committed reversible error in (a) instructing the jury regarding the bearing of a related civil suit on the credibility of a government witness, (b) ordering that two former employees of a Bahamian branch of an American bank give testimony with respect to bank transactions despite the existence of a Bahamian bank secrecy law, and (c) permitting the selective use of an interpreter by a government witness.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were both convicted on two counts charging the use of fictitious names in carrying out a mail fraud scheme and one count charging conspiracy to violate the mail fraud, fictitious names fraud and transportation of converted securities statutes, in violation of 18 U.S.C. 1342 and 371. In addition, petitioner Frank was convicted on four substantive counts charging the transportation of converted securities, in violation of 18 U.S.C. 2314. Both petitioners were sentenced to imprisonment for concurrent terms of five years. The court of appeals affirmed (Pets. App. A).

A. EVENTS PRIOR TO THE FRAUDULENT LAND PURCHASE

The evidence is substantially set forth in the main in the comprehensive opinion of the court of appeals (Frank Pet. App. A, 3a–14a). The victim of the fraud was Mrs. Marie Trujillo Dominguez, the daughter of the former leader of the Dominican Republic. After her father's assassination in 1961, Mrs. Dominguez, then 21, moved to Spain, where she remained until 1967, when she travelled to the United States (App. 182a–185a).[1] On arrival in New York City, she was met by petitioner Frank, a Washington, D.C., attorney whom she had met years before (App. 341a, 344a). Frank introduced Mrs. Dominguez to petitioner Borgman, who was using the alias of Miller.

Frank acted as a fiduciary for Mrs. Dominguez. On his advice, Mrs. Dominguez opened a personal checking account at the Bank of New York in August 1967 (App. 188a). He also introduced her to co-defendant Alfred J. Hemlock, a New York attorney, who agreed to participate in a scheme to lure Mrs. Dominguez' estranged husband away from their home in Spain while she removed certain valuables and personal property. After this scheme succeeded, Frank arranged a Mexican divorce for Mrs. Dominguez and Borgman travelled with her to Juarez, Mexico, to obtain it.

In September 1967, Hemlock and his law partner, co-defendant Harry Hoffer,[2] began advising Mrs.

[1] "App." refers to the two-volume Appendix filed in the court of appeals, a copy of which we are lodging with the Clerk.

[2] Tried jointly with petitioners, Hemlock and Hoffer were convicted on various counts and sentenced to imprisonment for

(Continued)

Dominguez concerning a property settlement with her husband. They learned thereby that she had two income-producing assets: mutual funds worth $1 million and a certificate of deposit in a London bank worth $2.4 million. These assets were in the name of Planinvest, a Luxembourg holding corporation wholly-owned by Mrs. Dominguez. On September 19, Hemlock and Mrs. Dominguez arranged for the London bank's interest payments to be remitted thereafter to her Bank of New York account, and for all communications regarding this account to be sent to Hemlock.

A month later, on Frank's advice, Mrs. Dominguez opened an account in the name of Planinvest at the New York branch of the Bank of London and South America. Mrs. Dominguez and both petitioners executed signature cards, thereby enabling any one of them to obtain information related to the status of the account. Furthermore, they directed that the bank statements be sent to Frank's Washington office.

Thereafter, petitioners assumed custody of Mrs. Dominguez' Planinvest checkbook; they made deposits and prepared checks for her signature, generally presenting a number at one time for her to sign and sometimes leaving blank the amounts on the checks. On these occasions petitioners would represent that they did not know the exact amount to be paid (App. 210a, 265a).

In the fall of 1967, petitioners suggested to Mrs. Dominguez that she invest in land in Canada to avoid

(Continued)

concurrent two-year terms, and the court of appeals affirmed their convictions (Pets. App. A, 3a). Their petitions for writs of certiorari are pending before this Court (Nos. 73–1849 and 73–1850).

a loss if the dollar were devaluated. Mrs. Dominguez agreed to listen to proposals, but specified that she would not consider a purchase over $200,000.

B. THE FIRST FRAUDULENT PURCHASE OF CANADIAN LAND

On January 9, 1968, Dr. George Hori conveyed property which he owned in suburban Montreal to co-conspirator Arthur Kay. The land, largely undeveloped marsh, was sold for $79,000 (App. 507a). The deed was executed in the Montreal office of Elie Solomon, a "notary."[3] Solomon was instructed to retain the deed pending payment of the $79,000 into his trust account for subsequent disbursement. Kay further informed Solomon that he would be reselling the land to a Bahamian corporation, which in turn would immediately convey it to a European corporation. Later that day Solomon received a telephone call from either Hoffer or Hemlock, indicating that the transactions would be completed in Nassau. The following day Solomon, Kay, co-defendant Maurice Hebert, and an attorney, Irving Adessky, flew to Nassau, after first landing in New York City, where they met Hemlock. Simultaneously, petitioner Borgman presented for certification by the drawee bank (the New York branch of the Bank of London and South America) a check on the Planinvest account, made payable to Columbia Corporation, Ltd., in the amount of $778,500 (Govt. Exh. 7; App. 689a–690a). The bank certified the check on the basis of a $780,000 transfer by telex from

[3] In Canada the notary is a lawyer who specializes in the examination of land titles, preparation of deeds, and other aspects of real estate transactions (App. 517a).

the Planinvest account in London to New York, and returned it to Borgman. Hemlock evidently had the check when he met the Montreal party at the airport and flew with them to the Bahamas. Hoffer met them all at the Nassau airport.

The following morning, January 11, the parties in Nassau met to complete the transfer of the Canadian property. First, the property was conveyed from Kay to Columbia Corp., Ltd., a Bahamian corporation represented by a local attorney and his secretary, both of whom affixed their signatures to the deeds. The next step was to be a transfer from Columbia to Planinvest. However, this transfer was delayed by Solomon because of the absence of any official document empowering anyone to execute a deed on behalf of Planinvest; during this interim period Hoffer told Solomon that Planinvest would be represented by Herbert Lefkowitz, but that the deed itself should refer to Planinvest in care of petitioner Frank at his Washington office. That afternoon, after Lefkowitz arrived with what purported to be an appropriate resolution, and Mrs. Dominguez' signature on that resolution was "authenticated" by Hemlock or Hoffer, the transfer to Planinvest was executed. Because the funds were not yet available, the notary still refused to relinquish the deeds, and the meeting was adjourned.

That same day Hemlock and Hoffer opened two bank accounts in Nassau, in the names of Columbia Corp., Ltd., and Splindian Investments, Ltd., listing three required signatures: Hemlock, Hoffer and petitioner Frank. The $778,500 Planinvest check was presented

for deposit in the Columbia account. The bank refused to allow draws on the deposit until the check had cleared the Federal Reserve Bank in New York City, a procedure requiring eight days. To expedite clearance the bank agreed to allow one of its secretaries to transport the check by air to New York the same day, thereby permitting the use of the funds the very next day.

On January 12 the $778,500 check was deposited in New York and the monetary aspects of the real estate transaction were completed when arrangements were made to transfer $79,000 to Solomon's trust account. On his stopover in New York City enroute to Montreal, Solomon delivered to Hoffer a special copy of the deed from Columbia to Planinvest. This copy did not contain the resolution empowering Lefkowitz to make the purchase on behalf of Planinvest; rather, the copy merely referred to the existence of a "duly authorized" resolution without further identification (Govt. Exh. 6).

In late January petitioner Borgman informed Mrs. Dominguez that she had purchased land in Canada. She protested that she had agreed only to an inquiry into such a purchase. At this point petitioner Frank entered the room. Borgman asked whether Mrs. Dominguez had recalled signing the check; she replied that she had not. Frank assured her that the purchase was proper and within the bounds she had set. Sometime later Borgman showed Mrs. Dominguez certain news articles reporting mineral explorations in Canada, and stated that the value of her land already had appreciated.

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C. THE SECOND TRANSACTION

A week after the first transaction, Kay and Solomon discussed the sale for $8,000 of a portion of a tract partially owned by Solomon. Kay indicated that the order of transfer to Planinvest would be similar to the first transaction, with one Denise Comeau replacing Kay and Splindian Investments replacing Columbia in the chain of title.

In late January, petitioner Borgman informed Mrs. Dominguez of the availability of Canadian land being sold at less than its value for tax purposes. He presented an appraisal in support of his statement (App. 211a). Initially, Mrs. Dominguez balked at buying more land, and Borgman telephoned petitioner Frank to inform him of that decision. Later, Mrs. Dominguez consented to allow Borgman to prepare a letter to her New York bank requesting three different bank appraisals. He prepared such a letter, which she signed.

On February 2, 1968, petitioner Borgman presented for certification by that bank a Planinvest check in the amount of $361,500, payable to Splindian Investments, Ltd. The check was certified and returned to Borgman. On February 4, Solomon, Adessky, Kay and Miss Comeau flew from Montreal to New York City, met Hemlock there, and then flew with him to Nassau, where Hoffer was waiting. The following day Lefkowitz appeared and the deeds were executed in a course similar to the prior transaction. That same day Hemlock and Hoffer deposited the $361,500 check in the Splindian account that they had previously opened; later, Kay paid Solomon $10,856 for the land and received a $2,856 rebate.

D. THE DISCOVERY OF THE FRAUD

In February or March 1968, Mrs. Dominguez' former financial secretary, Arcadio Santana, returned to her employ and assumed control of her finances. Through his inquiry, which he reported to Mrs. Dominguez, Santana learned of the exact amount paid for the first parcel of Canadian land. Confronted with this information, petitioner Frank once again assured Mrs. Dominguez that the land was worth the price paid. Not satisfied with this representation, Mrs. Dominguez consulted Hemlock and Hoffer on several occasions during the summer of 1968. At no time did these attorneys disclose their role in the transaction. Then, she dispatched Santana to Montreal to make his own investigation, and he learned of Hemlock's participation. At a meeting with Hemlock, Mrs. Dominguez reported Santana's revelations; Hemlock suggested that someone had been using his name in an unauthorized manner. Mrs. Dominguez also stated that she had learned the property was not worth what she had paid. Hemlock responded by agreeing to set up a meeting with petitioners Borgman and Frank.

Such a meeting occurred at Hemlock's law office on September 24, 1968. There, petitioner Frank admitted that the land was not worth what had been paid. He explained that the difference had been used to pay off the Central Intelligence Agency because of Mrs. Dominguez' alleged involvement in a plot to kill one of her father's assassins. Mrs. Dominguez called this explanation "preposterous" (App. 226a). Nothing was disclosed to Mrs. Dominguez about the

details of either land transaction.[4] Subsequently, she filed a civil suit against petitioners and Hemlock.[5]

ARGUMENT

1. Both petitioners challenge the sufficiency of the evidence underlying their convictions for violating 18 U.S.C. 1342. We note at the outset that petitioners were convicted on other counts and do not seriously assail the sufficiency of the evidence on those counts.[6] Since they received equal concurrent sentences on all counts, this Court in its discretion need not review the claim addressed to the sufficiency of the evidence

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[4] Mrs. Dominguez had never heard of Herbert Lefkowitz, who had acted as Planinvest's representative at the purchases (App. 234a).

[5] Bahamian bank secrecy laws prevented discovery of the records necessary to trace the disposition of the funds in the Splindian and Columbia accounts. The bank manager testified that sometime in March 1968, Hemlock, Hoffer and petitioner Frank all directed the withdrawal of a large amount of cash—somewhere between $300,000 and $600,000 (App. 640a–641a).

[6] In addition to the Section 1342 counts, petitioner Frank was convicted on four counts charging violations of 18 U.S.C. 2314, and both petitioners were convicted of conspiracy to violate several federal statutes, including Section 1342. Petitioner Frank argues that reversal of the Section 1342 counts would also require reversal of the conspiracy count, since the district judge had instructed the jury that a finding of conspiracy to violate Section 1342 alone would warrant a conviction on the conspiracy count. That argument, even if successful, would not avoid the application of the concurrent sentence doctrine as to Frank. To the extent that it might affect petitioner Borgman's conviction, we direct the Court's attention to the opinion of the court of appeals, which notes that conviction of conspiracy to violate Section 1342 would also include a finding of conspiracy to violate the general mail fraud statute, Section 1341, and that the evidence of that violation was ample (Borgman Pet. App. A, 16a, n. 12).

to support convictions under 18 U.S.C. 1342. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. In any event, petitioners' contentions are without merit.

a. Petitioners argue that their conduct does not fall within the proscriptions of 18 U.S.C. 1342, punishing an individual who, in the course of committing a mail fraud, "uses or assumes * * * any fictitious, false, or assumed title, name, or address or name other than his own proper name * * *," because the beneficiaries of their fraud were concealed through the use of the true names of actual people and corporations (*i.e.*, Kay, Comeau, Columbia, Splindian, etc.). They argue that absent proof of fictitious names, there was no violation of Section 1342.

As Judge Friendly's opinion noted (Frank Pet. App. A, 18a–19a), Section 1342 is not oft-used, but the few reported cases arising under it created no obstacle to its application to situations like the instant one, where the fraud is concealed by the use of several straw parties, whether or not these parties are correctly identified.[7] Cf., *e.g.*, *Fineberg* v. *United States*, 393 F. 2d 417 (C.A. 9); *Atkinson* v. *United States*, 344 F. 2d 97 (C.A. 8), certiorari denied, 382 U.S. 867; *United States* v. *Baren*, 305 F. 2d 527 (C.A. 2); *United States* v. *Kyle*, 257 F. 2d 559 (C.A. 2), certiorari denied, 358 U.S. 937.

Moreover, the legislative history of Section 1342

[7] Petitioner Borgman suggests that the intermediaries may have had full knowledge of their roles and had given their consent (Pet. 11). Nothing in the record supports this conjecture as to certain of the parties, such as Miss Comeau and officers of Columbia or Splindian.

supports a broad application of the statute. When first proposed in the House, Section 1342 was intended to deal only with the problem of mail frauds involving counterfeit money. Prompted by letters from a postal officials criticizing the limited scope of the bill, the Senate substituted its own broader version, stating that the measure proposed by the House was "not sufficiently explicit in terms and definitions to efficiently meet and grapple with the great evil aimed at." S. Rep. No. 2566, 50th Cong., 2d Sess., p. 1. The conference committee adopted the Senate's version, in language similar to that in the present statute, prohibiting an individual in carrying out a mail fraud from using, *inter alia*, "any * * * name other than his own proper name * * *." 25 Stat. 873. As the court of appeals held, petitioners' conduct fell within the intended proscription of that statute.

b. Petitioner Frank contends that his mail fraud convictions cannot stand because the fraud was complete when the real estate transactions occurred in the Bahamas, and the mailings, which occurred thereafter, were unrelated to the fraudulent scheme. To the contrary, the fraud involved more than the mere exchanges of title to real estate, and its successful execution required the use of the mails on several occasions. For example, the series of events occurring at Nassau prior to January 12 did not complete the first fraud, since an unassailable deed in behalf of Planinvest on the Canadian property had not yet been obtained. Although Solomon was willing to witness the execution of deeds at Nassau in accordance with Canadian law, he did not deem the transaction com-

pleted at that point because he had insufficient evidence that the corporations involved were empowered to buy and hold real estate. Accordingly, as a continuing part of the conspiracy, Hoffer used the mails on January 15 and again a few days later to send to Solomon pertinent copies of Columbia's and Planinvest's corporate papers (App. 567a–569a; Govt. Exhs. 17–19, 23). Still not satisfied with Planinvest's authority, Solomon mailed a letter to Hoffer on January 30 asking for additional proof (App. 569a–670a; Govt. Exh. 24). Thus, unlike *United States* v. *Maze*, 414 U.S. 395, the "deliberate, planned use of the mails after the victims' money had been obtained" (*Sampson* v. *United States*, 371 U.S. 75, 80) was in this case closely related to, and for the purpose of executing, the fraud.

c. Petitioners also challenge the comment in the court of appeals opinion that, when a defendant has presented no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence that would be impermissible if the defendant had supplied a credible exculpatory version (Frank Pet. App. A, 15a–16a). They urge that Judge Friendly's statement contradicts the well-settled law that adverse inferences may not be drawn from a defendant's failure to testify. In context, however, this statement does not impair petitioners' Fifth Amendment privilege. Rather, it merely means that when, as here, the defense offers no evidence whatsoever, the jury may well infer from the evidence adduced by the government the existence of matters adverse to the defendants, and that had the defendants supplied a credible

exculpatory version from any source—not limited to their own testimony—those inferences might have been impermissible. Judge Friendly's discussion included a correct statement of the test for reviewing the sufficiency of the evidence, *i.e.*, whether, considering the right of the jury to determine issues of weight and credibility and to draw inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt (Frank Pet App. A, 16a).

Moreover, the portion of the opinion containing the comments criticized by petitioners was not really directed at them, but rather at co-defendants Hoffer and Hemlock, the court having previously stated that "we think Frank's and Miller's [Borgman's] claims of insufficiency are so palpably devoid of merit as not to warrant extended discussion" (Frank Pet. App. A, 14a).

2. Petitioners' contentions that the district judge committed reversible error in his evidentiary rulings and instructions were all thoroughly considered and properly rejected by the court of appeals.

a. During the cross-examination of Mrs. Dominguez, counsel for Hoffer elicited the fact that she had filed a civil suit against Hemlock and petitioners, then pending in the same court (App. 286a–287a, 302a–303a). Counsel's purpose in adducing this testimony was to show that his own client had not been named in Mrs. Dominguez' civil complaint (App. 752a). During his lengthy closing argument (App. 765a–814a), counsel for petitioner Borgman made one reference to the civil suit, suggesting that if "she wins here, that means she will win in her civil suit" (App. 812a).

In his closing charge Judge Pollack instructed the jury that the pendency of the civil suit was no defense to the indictment. He also charged that a conviction in the criminal case would "not support a subsequent civil judgment" (App. 882a). Moreover, he explained the distinction between criminal prosecutions and civil suits (App. 880a–882a). The court concluded by stating that, insofar as the jury was concerned, the criminal and civil proceedings were unrelated except to the extent that the existence of the civil suit might affect Mrs. Dominguez' credibility (App. 882a).

Before deliberations began the court heard objections to the charge from defense counsel, none of whom had submitted any previous requests to charge. At this time petitioner Frank's counsel argued that the outcome of the criminal case might well settle certain issues in the civil case. After acknowledging that Judge Pollack had given a favorable instruction on the matter of credibility and a witness' interest in the outcome of the trial (App. 924a–925a), Frank's lawyer did not pursue the *res judicata* contention further. However, counsel for Hemlock asked the court to charge that the jury may consider that Mrs. Dominguez' motive or interest might be affected by the fact that she stood to gain in the event of a conviction (App. 931a). Thereafter, the court gave a supplementary charge to the effect that there was no question about the existence of the civil suit, and that "naturally she is a litigant and has an interest in that civil suit, and you may consider her testimony accordingly" (App. 932a–933a).

The court of appeals held that a conviction here would operate as collateral estoppel in favor of Mrs. Dominguez in her civil suit (Frank Pet. App. A, 30a–32a), but concluded that the trial court's erroneous instruction was not reversible error (*id.* at 32a–33a). This ruling was correct. The instruction desired by petitioners was addressed to the credibility of the witness. As to this collateral question, the jury was well aware of both the hostility borne by Mrs. Dominguez against all of the defendants and her substantial interest in the outcome of this case. Moreover, defense counsel had never offered a written version of the instruction they would have preferred. See Rule 30, Fed.R.Crim.P. Accordingly, in context, the error complained of was not serious, and, particularly in view of petitioners' failure to take preventive measures (Frank Pet. App. A, 34a), does not warrant reversal of their convictions.

b. Among the government witnesses were Michael Latvis, the manager of the Nassau branch of the First National City Bank at the time of the fraud, and Elizabeth Reilly, then Latvis' secretary. By the time of trial Latvis had severed his relations with First National City Bank and was living in Milwaukee, and Miss Reilly had been transferred to a suburban New York City branch of that bank. These witnesses testified about events surrounding the opening of the Columbia and Splindian accounts at the Nassau branch by Hemlock and Hoffer, the depositing of the two Planinvest checks, Miss Reilly's travel to New York City at the expense of the depositors to expedite clearance of the checks, and the subsequent withdrawal of

hundreds of thousands of dollars from the accounts by Hemlock, Hoffer and petitioner Frank.

Citing a Bahamian law prohibiting individual bank employees from divulging information related to the affairs of the bank or its customers acquired in the performance of duties, without court order, petitioners claim that the compulsion of former employees to testify without the permission of the Bahamian courts[8] violated principles of comity (Frank Pet. 16–19). Under customary principles of standing, petitioners appear to be in no position to contest the court's ruling that the two former bank employees were not covered by the Bahamian secrecy statute. The bank's "customers" were the two corporations in whose names Hemlock and Hoffer had opened accounts. Petitioner Borgman was never shown to have had any dealings with the Nassau bank; petitioner Frank's activities were limited to executing a signature card on behalf of the corporate depositors and thereafter aiding in the withdrawal of funds. Neither petitioner is subject to sanctions in the foreign court for any revelations by the two ex-employees. See *First Nat'l City Bank* v. *Internal Revenue Service*, 271 F. 2d 616, 619 (C.A. 2).

Moreover, as the court of appeals noted, it is not clear that the Bahamian statute was intended to reach oral testimony given by witnesses unaccompanied by revelations of private records (Frank Pet. App. A, 23a). Finally, as the court further noted, principles of

[8] Less than a week before trial, which began in early June 1973, a Bahamian judge had issued a disclosure order, but had stayed the execution of the order pending appeal by the bank (App. 108a–110a).

comity do not require that American citizens be barred from testifying in an American court to facts within their knowledge concerning the activities of other Americans in a foreign country while engaging in a scheme to violate American criminal law (*ibid.*). Where such circumstances occur, and the laws of the sovereigns conflict as to the giving of testimony, the United States court's duty is to "balance the national interests" of the countries involved. *United States* v. *First Nat'l City Bank,* 396 F.2d 897, 902 (C.A. 2). Taking into consideration the respective national interests, the forum, the potential hardships upon the parties, the nationalities, and the nonavailability of alternative measures (see *Restatement (Second) of Foreign Relations Law of the United States* § 40 (1965)), the district court cannot be faulted for allowing Latvis and Reilly to testify.

c. Despite the objections of defense counsel, the district court permitted an interpreter to be sworn and to be used during the testimony of Mrs. Dominguez on occasions where she was unable to express herself properly in English. Although the court of appeals was somewhat critical of this selective use of an interpreter, particularly during cross-examination, it canvassed the record and concluded—properly, we submit—that the dozen or so incidents during which the witness resorted to an interpreter in the course of a day-long cross-examination did not deprive petitioners of any substantial rights.

Although petitioners attack the failure of the district court to qualify the interpreter formally (Frank Pet. 12), they do not challenge the competency of the

interpreter or the correctness of her translations. Their complaint is limited to the handful of occasions when Mrs. Dominguez's resort to the interpreter may have reduced the dramatic effect of their cross-examination (Frank Pet. 11). That alone would not warrant reversal of petitioners' convictions.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974